

# Whistleblower Complaint Taking Too Long? Try Kicking It Out

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Too often, complaints filed under federal whistleblower statutes languish in a protracted investigative phase long before the relevant federal agency issues a determination as to the employees' claims. While control over federal whistleblower investigations remains in the hands of the investigating federal agency, many federal whistleblower statutes carve out an important tool for employees to ensure that they obtain speedy resolution of their claims. This tool, which is commonly referred to as a "kick-out" provision, permits employees to transfer their whistleblower actions to federal court if their administrative complaint has been before the relevant federal agency for a certain period of time without final resolution.

A recent decision from the U.S. District Court for the Eastern District of Michigan underscores the importance of the kick-out provision in the context of the [Federal Railroad Safety Act](#), 49 U.S.C. § 20109 ("FRSA"), and provides guidance on common issues faced by employees seeking to utilize kick-out provisions. See *Wagner v. Grand Trunk Western Railroad*, No. 15-10635, 2016 WL 1161351 (E.D. Mich. Mar. 23, 2016).

## The FRSA Kick-Out Provision

In *Wagner*, Jacob Wagner, a carpenter working for Grand Trunk Railroad, alleged that Grand Trunk retaliated against him for filing a workplace injury report. Believing Grand Trunk's conduct violated the FRSA - which prohibits railroads engaged in interstate commerce from retaliating against employees for "notify[ing], or attempt[ing] to notify, the railroad carrier...of a work-related personal injury or work-related illness" - Mr. Wagner filed an administrative complaint with the Secretary of Labor (the "Secretary") via the U.S. Occupational Safety and Health Administration ("OSHA") pursuant to § 20109(d)(1) of the FRSA.

On Feb. 18, 2014, more than 210 days after the filing of Mr. Wagner's administrative complaint, OSHA found reasonable cause to believe Grand Trunk violated the FRSA and awarded Mr. Wagner damages. On March 10, 2014, Grand Trunk objected to OSHA's ruling and requested a hearing from an Administrative Law Judge ("ALJ"). On Jan. 9, 2015, several months after the parties' hearing from the ALJ, the ALJ released a 23-page opinion finding against Mr. Wagner. On Jan. 23, 2015, Mr. Wagner appealed the ALJ's order to the Administrative Review Board ("ARB"), and on Jan. 26, 2015, Mr. Wagner filed a notice of intent to file suit in federal court pursuant to the FRSA's kick-out provision, 49 U.S.C. § 20109(d)(3), which permits employees to pursue an action in federal court if the Secretary has not issued a final decision within 210 days after the filing of their administrative complaint, assuming the delay is not due to the bad faith of the complainant.

## Challenges to the Kick-Out Provision

Grand Trunk moved to dismiss Mr. Wagner's federal lawsuit arguing, *inter alia*, that Mr. Wagner was unable to invoke the FRSA kick-out provision because the Secretary had issued a final decision before

Mr. Wagner filed suit, and even if it had not, Mr. Wagner acted in bad faith.

With respect to Grand Trunk's first argument, the key question before the court was whether the Secretary had issued a final decision prior to Mr. Wagner commencing his lawsuit. Though courts disagree whether the FRSA permits an employee to go to federal court even after the Secretary issues a final decision, provided that no final decision had been issued within 210 days of when the employee filed the administrative complaint, the court did not have to reach that issue because it found that Mr. Wagner timely appealed the ALJ's Jan. 9, 2015, opinion to the ARB, and therefore the decision never became final. Given this, the court found that Mr. Wagner's prior administrative action had not barred his access to federal court and that the complaint was properly before the court.

In addition to the timeliness issue, the court also addressed whether Mr. Wagner had acted in bad faith, and if so, whether his conduct precluded his action in federal court. Under the FRSA, an employee may not invoke the kick-out provision if the delay in the case is caused by the employee's bad faith. In *Wagner*, Grand Trunk argued that Mr. Wagner engaged in bad faith by participating in the administrative process while knowing he could exercise the kick-out provision if he received a bad result. The court flatly rejected this argument, noting that no court had ever found that merely exercising the kick-out rights conferred under § 20109(d)(3) constituted bad faith. Instead, the court emphasized that Mr. Wagner's bad faith had to have *caused the delay* in order for him to be barred from relying on the FRSA kick-out provision. While the court observed that plaintiff's exercise of the kick-out provision at this late stage in the administrative process may have led to duplication of efforts and engendered frustration, it concluded that his conduct did not constitute bad faith.

## **Other Whistleblower Kick-Out Provisions**

In summary, kick-out provisions are important components of federal whistleblower statutes because they help employees better ensure a speedy resolution of their claims. Kick-out provisions appear in several federal whistleblower statutes, including the [Sarbanes-Oxley Act](#), which provides whistleblower protection for employees who report securities violations; the [Energy Reorganization Act](#), which provides whistleblower protection for employees in the nuclear industry; and the [FDA Food Safety Modernization Act](#), which provides whistleblower protection for employees in food and drug industries, to name a few. To reap the benefits of these kick-out provisions, however, employees should be sure to invoke their rights under the statute in a timely manner and in good faith.